90-632

(1)

FILED
OCT 17
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1990

CAESAR ELECTRONICS INC.,

Petitioner,

v.

FAIRCHILDS SEMICONDUCTOR CORPORATION
SCHLUMBERGER TECHNOLOGIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Dean Francis Pace
PACE QUINN AND ROSE
Suite 2080 Century City North
10100 Santa Monica Boulevard
Los Angeles, California 90067
Telephone: (213) 277-2900

Attorneys for Petitioner
CAESAR ELECTRONICS INC.

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED

1. Whether all violations of civil law by a party who cooperates with the government in a federal criminal investigation are immune from civil liability, including breach of fiduciary duty - the highest duty known to the law.

2. Whether violation of civil law for "its own commercial interests" by a party who cooperates with the government in a federal criminal investigation is immune from civil liability.

3. Whether the unilateral request for agency "for its own commercial interests" by a party who cooperates with the government in a federal criminal investigation and the breach of that agency fiduciary duty during the federal criminal investigation are immune from civil liability.

4. Whether the rule of immunity law created by the Ninth Circuit is unconstitutionally vague and overbroad under the Fifth Amendment to the United States Constitution.

5. Whether the Ninth Circuit decided the question of immunity from civil liability in a way in conflict with California law.

6. Whether a federal interstate and international criminal investigation should be governed by state law.

7. Whether the federal criminal investigation was lawful.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES CITED vi

PARTIES 1

OPINIONS AND ORDERS BELOW 2

JURISDICTION 2

CONSTITUTION AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT 9

1.

JURISPRUDENCE 9

2.

THE NINTH CIRCUIT SYLLOGISTIC SUMMARIZATION OF THE ARGUMENT BY PETITIONER IS WITHOUT PREMISE 11

3.

THE NINTH CIRCUIT DECISION ON IMMUNITY FROM CIVIL LIABILITY IS IN CONFLICT WITH THE CALIFORNIA LAW 14

4.

THE RULES OF LAW CREATED BY THE NINTH CIRCUIT IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION 22

5.

THE CONCLUSION THAT FAIRCHILD WAS THE

AGENT OF CAESAR TO PREPARE EXPORT DOCUMENTS TO CONFORM TO THE EXPORT LICENSE IS FALSE OR A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL 24

6.

BECAUSE THE APPEAL INVOLVES AN INTERSTATE AND INTERNATIONAL FEDERAL CRIMINAL INVESTIGATION, CALIFORNIA LAW SHOULD NOT GOVERN 26

7.

THE FEDERAL CRIMINAL INVESTIGATION WAS NOT LAWFUL 28

PRAYER 29

APPENDIX A

OPINION BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT A1

APPENDIX B

ORDER BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT B1

APPENDIX C

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA C1

APPENDIX D

ORDER DENYING PLAINTIFF'S MOTION TO VACATE JUDGMENT BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA..... D1

APPENDIX E

SECTION 47(2), CALIFORNIA CIVIL CODE..... E1

APPENDIX F

SECTION 830.6 (b), CALIFORNIA PENAL CODE F1

APPENDIX G

SECTION 1530, CALIFORNIA PENAL CODE G1

APPENDIX H

19 U.S.C. § 507 ..... H1

TABLE OF AUTHORITIES CITED

Cases	Page
Angel v. Seattle First National Bank, 653 F.2d 1293 (9th Cir. 1981)	10, 13, 23
Brady v. Marland, 373 U.S. 83 (1963)	9
Cervantes v. J.C. Penny Co., 24 Cal. 3d 579 (1979)	17
Forro Precision Inc. v. IBM Corp., 673 F.2d 1045 (9th Cir. 1982)	3, 14, 17, 18, 19, 22, 23
Grayned v. City of Rockford, 408 U.S. 1041, 108-109 (1972)	23
Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850 (10th Cir. 1972)	19
People v. Barksdale, 8 Cal.3d. 320 (1972)	23
People v. Barraza, 23 Cal.3d. 675 (1979)	19, 20
People v. McIntire, 23 Cal.3d. 742 (1979)	19, 20
Peterson v. Robison, 43 Cal.2d 690, 277 P.2d 19 (1954)	15, 16, 19, 22, 23
Sokol v. Public Utilities Comm'n., 65 Cal.2d 247, 418 P.2d 265, 53 Cal.Rptr. 673 (1966)	15, 16, 19, 23
United States v. Clegg, 864 F.2d 1221 (9th Cir. 1988)	21
United States v. Cohen Grocery Co., 255 U.S. 81	23
United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987)	21

Vallindras v. Massachusetts Bonding & Ins. Co., 42 Cal.2d 149, 265 P.2d 907 (1954) 15, 17
Willig v. Gold, 75 Cal.App.2d 809 (1946) 19

Statutes

California Civil Code
Section 47(2) 3, 14
California Penal Code
Sections 830.6(b) and 1530 ..... 3, 14, 15, 17
19 U.S.C.
§ 507 3
28 U.S.C.
§ 1254 (1) 2
§ 1332 3

Rules

Federal Rules of Appellate Procedure
Rule 42(b) 2
Federal Rules of Civil Procedure
Rule 56(e) 26

No. _____

In the Supreme Court of the United States

October Term, 1990

CAESAR ELECTRONICS INC.,

Petitioner,

v.

FAIRCHILDS SEMICONDUCTOR CORPORATION
SCHLUMBERGER TECHNOLOGIES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PARTIES

The parties are the Petitioner-Plaintiff, Caesar Electronic, Inc. ("CAESAR"), a New York corporation, and the Respondent-Defendants, Fairchild Semiconductor Corporation, a Delaware corporation, and Schlumberger Technologies Inc., a Delaware corporation (collectively "FAIRCHILD").

On May 19, 1988, the United States District Court for the Central District of California filed an ORDER GRANTING MOTION TO DISMISS thereby dismissing Defendant, Paul R. Andrews, Director of Customs,

United States Customs Service as a party-defendant and Judgment was entered on October 27, 1988. By Order filed March 10, 1989, the United States Court of Appeals for the Ninth Circuit granted the motion by CAESAR to voluntarily dismiss Defendant, Paul R. Andrews, Director of Customs, United States Customs Service, only under the Federal Rules of Appellate Procedure, Rule 42(b), and therefore, would not be before the United States Supreme Court.

OPINIONS AND ORDERS BELOW

The Opinion by the United States Court of Appeals for the Ninth Circuit, reported at 905 F.2d 287, appears in Appendix A. The Order by the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing, not reported, appears in Appendix B. The ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT of the United States District Court for the Northern District of California, not reported, appears in Appendix C. The ORDER DENYING PLAINTIFF'S MOTION TO VACATE JUDGMENT by the United States District Court for the Northern District of California, not reported, appears in Appendix D.

JURISDICTION

The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on June 7, 1990 (Appendix A). A timely petition for rehearing by the United States Court of Appeals for the Ninth Circuit was denied on July 20, 1990 (Appendix B). The Petition for a Writ of Certiorari was filed within 90 days of July 20, 1990.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTION AND STATUTES INVOLVED

Due Process Clause of the Fifth Amendment to the United States Constitution ". . . nor be deprived of life, liberty, or property, without due process of law. . ."

The Ninth Circuit predicated its decision upon Section 47(2) of the California Civil Code (Appendix E). Both the Ninth Circuit and the District Court relied upon *Forro Precision Inc. v. IBM Corp.*, 673 F.2d 1045, 1052-1053 (9th Cir. 1982) which applied Sections 830.6(b) and 1530 of the California Penal Code (Appendix F and G). The District Court distinguished as inapplicable 19 U.S.C. § 507 and the 1986 amendment thereto by the addition of subsection (b) (Appendix H).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the United States District Court for the Northern District of California against Respondents-Defendants Fairchild Semiconductor Corporation and Schlumberger Technologies Inc. was predicated upon Diversity of Citizenship, 28 U.S.C. § 1332.

On September 22, 1988, the Court filed an ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT (Appendix C) wherein the District Court ruled in favor of CAESAR on the Second Cause of Action for Breach of Agency Fiduciary Duty and the Third Cause of Action for Fraud, to wit:

> "Fairchild apparently does not dispute that, in an ordinary commercial context, its actions would constitute a breach of the fiduciary duty of loyalty requiring it to keep its principal fully informed and to disclose all material facts. *See, e.g., Langford v. Thomas*, 200 C1 192 (1927);

> *Whittaker v. Otto*, 188 Cal.App.2d 619 (1961). Likewise, it seems clear that, under ordinary business circumstances, Fairchild's behavior was fraudulent." (Page C11, Appendix C)
>
> "Alternatively, Caesar focuses on the fact that the federal government did not request or require that Fairchild become Caesar's agent. As Caesar correctly observes, Fairchild sought this authority from Caesar for its own commercial interests "to insure that any government sting operation did not deprive it of payment for the Sentry System." (Page C16, Appendix C).

The District Court granted Summary Judgment to FAIRCHILD on its Affirmative Defense of immunity from civil liability for breach of fiduciary duty by FAIRCHILD as the agent of CAESAR for "its own commercial interests" (Appendices C and D). The Ninth Circuit granted FAIRCHILD immunity from civil liability for every violation of civil law, except malicious prosecution (Page A9, Appendix A).

Counsel for Petitioner would not have accepted representation of CAESAR if FAIRCHILD had not requested, secured and acted as the agent of CAESAR, and then breached the agency fiduciary duty by representing to CAESAR that FAIRCHILD was an expert in letter of credit export transactions and then prepared, executed and certified all of the shipment and export documents (with the exception of obtaining the export license) and performed all of the transactions incident to the shipment, export and letter of credit sale of the SENTRY SYSTEM.

In 1984, Petitioner, Caesar Electronics Inc., was a small electronics broker-distributor with eighteen

employees in Bayshore, New York and San Juan, Puerto Rico. Its business was to buy electronics products from manufacturers and resell them to customers. Approximately one-third of its business was export sales.

In May 1983, CAESAR received an order from Rudolphe Agnese of Development Engineering and Electronics Ltd. in Paris, France ("DEE"), with whom CAESAR had previously conducted business, for a Sentry 20 LSI/VLSI Integrated Test System ("SENTRY SYSTEM") to be resold in France to Compagnie Europeenne Pour L. Industrie Et Le Commerce Int'l, Div. C.S.F. Thomson in Chatou, France ("CSF THOMSON"). CAESAR issued a Purchase Order for the SENTRY SYSTEM to FAIRCHILD which accepted the order in 1983 and again in 1984.

CAESAR filed an Export Application for the SENTRY SYSTEM with the Department of Commerce which issued and *validated* an Export License to CAESAR for export of the SENTRY SYSTEM to the "Purchaser" DEE for resale to the "Ultimate Consignee" CSF THOMSON. The license expired in September 1983.

In August 1983, FAIRCHILD reported the sale of the SENTRY SYSTEM to the United States Customs Service ("USCS") and the Department of Commerce ("DOC") which conducted a prelicense check through the United States Embassy in Paris, France and secured verification from CSF THOMSON that it had not ordered and had no knowledge of the SENTRY SYSTEM. Having been fully informed that CSF THOMSON had not ordered the SENTRY SYSTEM, the Department of Commerce issued and *validated* another Export License A724404 on December 19, 1983, valid through December 1984, to CAESAR for export of the SENTRY SYSTEM to the "Purchaser" DEE for resale to the "Ultimate Consignee"

CSF THOMSON. Export License A724404 contained a special stamp: "Distribution or resale of the commodities listed above is permitted in France only." The Department of Commerce also required that CAESAR secure a Certificate of International Importation from the Ministere des Finances et des Affaires Economiques in Paris, France, to control the importation of the SENTRY SYSTEM in France.

From January through April 1984, CAESAR sold electronic components to FAIRCHILD. Then, on April 25, 1984, a Manager of FAIRCHILD telephoned Warren Thompson, Vice President of CAESAR, in Las Vegas, Nevada, where he was attending an electronics convention away from his office and his management, to inform him (monitored by the Special Agents of DOC and USCS) that the SENTRY SYSTEM would be shipped on April 30, 1984 but that ENERTEC, the subsidiary of FAIRCHILD in France, had informed that CSF THOMSON had not ordered the SENTRY SYSTEM. After indicating his surprise, Warren Thompson cooperated with FAIRCHILD and gave FAIRCHILD (monitored by the Special Agents of DOC and USCS) the home and business telephone number of Rudolphe Agnese of DEE. FAIRCHILD telephoned Rudolphe Agnese in Paris, France (monitored by the Special Agents of DOC and USCS) and confirmed that DEE had "lost" its order from CSF THOMSON due to the delay in delivery of the SENTRY SYSTEM.

On April 26, 1984, FAIRCHILD requested that FAIRCHILD be appointed the agent of CAESAR to prepare all documentation and to perform all shipment, export and letter of credit sale transactions for the SENTRY SYSTEM. FAIRCHILD represented to Warren Thompson that FAIRCHILD was an expert in letter of

credit export transactions. The FAIRCHILD agency was agreed by Warren Thompson on April 26, 1984 and was confirmed by telegram on April 30, 1984, the day on which the SENTRY SYSTEM was shipped and exported by FAIRCHILD and the day on which FAIRCHILD sent the letter of credit payment documents to the Swiss Bank in Zurich, Switzerland and to the Norstar Bank in Bayshore, New York, which was the bank of CAESAR. The agency was further confirmed by CAESAR letter dated May 3, 1984.

On April 27, 1984, a Manager of FAIRCHILD represented to Warren Thompson that FAIRCHILD was "convinced" that the shipment and export of the SENTRY SYSTEM to CSF THOMSON was "OK", "copasetic", "alright" and "no problem" according to the FAIRCHILD expert on export law. FAIRCHILD has admitted that it lied to Warren Thompson 62 times from April 25-30, 1984 with regard to the shipment, export, and sale of the SENTRY SYSTEM.

No one at CAESAR had seen nor executed any document with regard to the shipment, export or letter of credit sale of the SENTRY SYSTEM prior to the shipment and export of the SENTRY SYSTEM by FAIRCHILD on April 30, 1984. FAIRCHILD mailed a copy of the SENTRY SYSTEM shipment, export and letter of credit sale documents to CAESAR on May 3, 1984, the day that the SENTRY SYSTEM was seized by the USCS in Los Angeles, California. Payment for the SENTRY SYSTEM was received by FAIRCHILD on May 11, 1984, the day that a search warrant was executed at the offices of CAESAR in Bayshore, New York. Significantly, Caesar Electronics Inc. has never been charged nor indicted for any criminal violation whatsoever.

From September 1983 through May 11, 1984, DOC and USCS requested FAIRCHILD to be an informant and to deliver a facsimile SENTRY SYSTEM. In April, 1984, the United States Custom Service requested the "consignment" of a facsimile SENTRY SYSTEM which FAIRCHILD delivered to the USCS on April 27, 1984. Although the evidence is that FAIRCHILD sold the actual SENTRY SYSTEM with the "knowledge and consent" of the DOC and USCS Special Agents, there is no evidence that anyone in the United States Government requested FAIRCHILD to sell the actual SENTRY SYSTEM. Quite to the contrary, the facsimile SENTRY SYSTEM was requested by the USCS and was shipped to Paris, France. In response to questions by the Hon. Mary M. Schroeder, United States Circuit Judge, during oral argument whether there was request to FAIRCHILD by anyone in the United States Government to sell the actual SENTRY SYSTEM, Counsel for FAIRCHILD responded "Yes and No." In reply argument, Counsel of CAESAR earnestly urged that the absence of specific evidence and the "Yes and No" response created at least a genuine issue of material fact for trial.

No one in all of the related actions in the United States Court for the Northern District of California has had his day in Court. In the instant Civil Action by CAESAR, the District Court granted Summary Judgment to FAIRCHILD sustained by the Ninth Circuit. In a related forfeiture action by CAESAR, the District Court dismissed the action and the Ninth Circuit dismissed the appeal. In the criminal prosecution of Warren Thompson, Vice President of CAESAR, a San Francisco attorney bled CAESAR of $120,000, and then when CAESAR had no more money, pled Warren Thompson guilty (solely for failure to inform DOC that

CSF THOMSON had not ordered the SENTRY SYSTEM which DOC had confirmed through the United States Embassy in Paris, France before DOC issued and validated the Export License). The motion by Warren Thompson through a Federal Defender to vacate his plea before sentence was denied by the District Court, sustained on appeal by the Ninth Circuit, which in the Warren Thompson appeal, was deprived of the evidence delineated herein by the Justice Department in violation of *Brady v. Marland*, 373 U.S. 83 (1963). The Justice Department restrained Counsel for CAESAR from disclosure of the evidence delineated herein to the Federal Defender of Warren Thompson. The Justice Department sought to have the evidence delineated herein suppressed from the Ninth Circuit in the CAESAR appeal, whereby Counsel for CAESAR was required to secure an extraordinary order by the District Court to have the Ninth Circuit designated as a "qualified person" under the Protective Order secured by the Justice Department.

REASONS FOR ALLOWANCE OF THE WRIT

1.

JURISPRUDENCE

Petitioner respectfully submits that the fundamental issue of immunity from civil liability for violation of civil law by a party who cooperates with the Government in a federal criminal investigation, would be an issue of first impression in the United States Supreme Court.

Jurisprudence may dictate that the interests of the parties should be consistent with the social interest. Petitioner recognizes the social interest in encouragement of public cooperation in federal criminal investigations. If the social interest in cooperation is

absolute without limitation as held by the Ninth Circuit, then the Petition for Writ of Certiorari should be denied. If there should be limitation, e.g. police authorization and reasonable police request vis-a-vis the commercial interests of the violator of civil law, then the Petition for Writ of Certiorari should be granted.

It is earnestly urged that the Ninth Circuit delineated the jurisprudential standard in its decision denying immunity from civil liability, *Angel v. Seattle First National Bank*, 653 F.2d 1293, 1297 (9th Cir. 1981), to wit:

> "It is true, as the Government asserts, that legal doctrines develop to effectuate policy goals. But it does not follow that a court is free to ignore legal doctrine in order to serve underlying policy. If the law operated that way, there would be no need for any legal principals."

While granting FAIRCHILD immunity from civil liability for breach of fiduciary duty, the Ninth Circuit held that "(h)owever high that duty an agent may owe its principal, society's interest in preventing the commission of criminal acts overrides that duty." (Pages A6-7, Appendix A). The District Court characterized as "fantastical" the notion by CAESAR "that a fiduciary duty 'trumps' the compelling interest in enforcing this nation's export laws and regulations" (Page C18, Appendix C). CAESAR earnestly urges that the compelling interest in enforcing this nation's export laws and regulations should not "trump" the highest duty known to the law - fiduciary duty. If interest in the enforcement of federal laws and regulations "trumps" every violation of civil law, then there is nothing secure in business, family or society from the police power of the federal government.

In essence, the Ninth Circuit has exonerated FAIRCHILD as a double agent. There is no evidence whatsoever that anyone in the United States Government requested or required that FAIRCHILD request or act as the agent of CAESAR. The record is crystal clear that FAIRCHILD requested and acted as the agent of CAESAR "for its own commercial interests" (in the words of the District Court) to make a profit on the sale of the SENTRY SYSTEM.

> "Alternatively, Caesar focuses on the fact that the federal government did not request or require that Fairchild become Caesar's agent. As Caesar correctly observes, Fairchild sought this authority from Caesar for its own commercial interests "to insure that any government sting operation did not deprive it of payment for the Sentry System." (Page C16, Appendix C).

The decision by the Ninth Circuit creates new federal common law that violation of civil law during a federal criminal investigation is exempt from civil liability even if the civil violation was not pursuant to a reasonable police request and even if the civil violation was for the own commercial interests of the violator of civil law.

2.

THE NINTH CIRCUIT SYLLOGISTIC SUMMARIZATION OF THE ARGUMENT BY PETITIONER IS WITHOUT PREMISE

The decision by the Ninth Circuit "summarized" the argument by CAESAR (Page A6, Appendix A), to wit:

> "[1] Caesar's argument may be summarized by the following syllogism: (1) an agent's fiduciary obligation to disclose all pertinent confidential

> information to its principal is the "highest duty known to law"; (2) Fairchild was at all relevant times acting as Caesar's agent; (3) by withholding from its principal the confidential information that Caesar was the target of a federal criminal investigation, Fairchild violated its fiduciary obligation to this principal. This argument is meritless."

The syllogistic summarization by the Ninth Circuit is without premise. It is not now nor has it ever been the arguement of CAESAR. It is not the argument of CAESAR that the agent FAIRCHILD has the fiduciary obligation to disclose the "confidential information that Caesar was the target of a federal criminal investigation." It is the argument of CAESAR that on and after FAIRCHILD became the agent of CAESAR on April 26, 1984, FAIRCHILD had the duty not to ship, export and secure letter of credit sale of the actual SENTRY SYSTEM, when the agent FAIRCHILD was informed that the United States Custom Service and the United States Department of Commerce considered that the shipment and export of the SENTRY SYSTEM was unlawful. Once FAIRCHILD requested and assumed the agency on April 26, 1984, it was under a fiduciary duty not to profit from any unlawful act nor any act for "its own commercial interests" as a fiduciary agent. FAIRCHILD need not have disclosed anything to CAESAR. Once FAIRCHILD requested and assumed the agency on April 26, 1984, FAIRCHILD should have acted to protected its principal from any violation of law with regard to the shipment, export and sale of the SENTRY SYSTEM. FAIRCHILD should not be permitted to choose which of its masters it would serve as a double agent.

The District Court has held (uncontroverted by the Ninth Circuit) that in an ordinary commercial context, the actions of FAIRCHILD would constitute a breach of fiduciary duty (Page C11, Appendix C). CAESAR respectfully submits that FAIRCHILD had many alternatives to avoid becoming the double agent of CAESAR "for its own commercial interests" so as to avoid the fiduciary duty which an Agent owes to its Principal in commercial law.

(1) FAIRCHILD should have refused to sell the actual SENTRY SYSTEM.

(2) FAIRCHILD should have insisted that the Government purchase the actual SENTRY SYSTEM from FAIRCHILD so that the agency for shipment, export and letter of credit sale would have been unnecessary.

(3) FAIRCHILD should have secured indemnification from the Government for the purchase price of the actual SENTRY SYSTEM as was done in the *Angel* case, so that the agency for shipment, export and letter of credit sale would have been unnecessary.

The Ninth Circuit syllogistic summarization that the CAESAR "position vis-a-vis Fairchild was from beginning to end one of the principal-agent" is without premise. It is not now nor has it ever been the position of CAESAR. It is the position of CAESAR that FAIRCHILD was the agent of Appellant only during the period April 26, 1984 to May 11, 1984 when FAIRCHILD performed all of the transactions incident to the shipment, export and letter of credit sale of the SENTRY SYSTEM.

3.

THE NINTH CIRCUIT DECISION ON IMMUNITY FROM CIVIL LIABILITY IS IN CONFLICT WITH THE CALIFORNIA LAW

While granting FAIRCHILD immunity from civil liability for breach of fiduciary duty, the Ninth Circuit applied Section 47(2) California Civil Code (Appendix E), to wit:

> Our conclusion that Fairchild is shielded from civil liability is also supported by the language set out in California Civil Code Section 47(2), which states, in relevant part, that "[a] privileged publication . . . is one made . . . [i]n any . . . official proceeding authorized by law." The Supreme Court of California has held that this statutory privilege applies to virtually all causes of action except malicious prosecution. *Ribas v. Clard*, 38 Cal.3d 355, 364, 696 P.2d 637, 643, 212 Cal.Rptr. 143, 149 (1985). *See also Forro I*, 673 F.2d at 1055 ("California courts have invoked the policies underlying the privilege to defeat liability for interference with business relations and related torts.")

Both the Ninth Circuit and the District Court relied upon *Forro Precision Inc. v. IBM Corp.*, 673 F.2d 1045, 1052-1053 (9th Cir. 1982) which applied Sections 830(b) and 1530 of the California Penal Code (Appendix F and G), to wit:

> California allows officers to request the aid of citizens in executing search warrants. *People v. Turner*, 249 Cal.App.2d 909, 927, 57 Cal.Rptr. 854, 865, *cert. denied*, 389 U.S. 963, 88 S.Ct. 348, 19 L.Ed.2d 375 (1967); Cal. Penal Code Section 1530 (West 1970). The California

legislature has provided that a citizen aiding an officer has such powers as the supervising officer may delegate. Cal. Penal Code Section 830.6(b) (West Supp. 1980). The officer himself is immune from suit arising out of the execution of a valid warrant. *Vallindras v. Massachusetts Bonding & Ins. Co.*, 42 Cal.2d 149, 265 P.2d 907, 910-11 (1954); Cal. Civ. Proc. Code Section 262.1 (West 1954). The California legislature has not, however, expressly provided for immunity for the citizen assisting a search.

We think that California Penal Code Section 830.6(b) must be understood as according to a citizen immunity that derives from the officer's own immunity. This result is supported by two California cases. In *Peterson v. Robison*, 43 Cal.2d 690, 697, 277 P.2d 19, 24 (1954), the California Supreme Court held that a private citizen is not subject to an action for false imprisonment when he makes an arrest at a peace officer's request. The court reasoned that it would be unfair to impose civil liability on a person when a California statute made it a misdemeanor to refuse an officer's request to aid in an arrest.

A more recent California Supreme Court case, *Sokol v. Public Utilities Comm'n.*, 65 Cal.2d 247, 418 P.2d 265, 53 Cal.Rptr. 673 (1966), held that a public utility was not civilly liable for disconnecting the plaintiff's phone after receiving notification from the local police chief that the phone was being used for illegal purposes. A state Public Utilities Commission

regulation required the phone company to disconnect phone service whenever it had reasonable cause to believe that a subscriber was using the phone for an illegal purpose, and further provided that notice from a law enforcement officer of such usage was sufficient to constitute reasonable cause. The court noted by reference to *Peterson* that it would be unfair to impose liability on a person for doing what the law requires, and stated further that "[a] contrary rule would not only be inequitable but would discourage cooperation with law enforcement agencies." 65 Cal.2d at 258, 418 P.2d at 272, 53 Cal.Rptr. at 680.

We conclude that the California courts would extend the reasoning of *Peterson* and *Sokol* to provide immunity to IBM. An attempt to distinguish this case from *Peterson* and *Sokol* on the basis that no statute required IBM to assist the police in searching Forro's premises is unconvincing. The principal basis for the holdings in the California cases is the policy of encouraging citizens to aid the police. Police officers occasionally have need to seek help from private citizens in conducting valid searches. Indeed, such assistance may be more necessary to the police in the context of a search, where technical knowledge may be wanted, than in the arrest context addressed in *Peterson*. A citizen should not have to assess his potential civil liability when presented with a reasonable police request for assistance. Otherwise, citizen cooperation might be deterred.

Wholly unmentioned by the Ninth Circuit or the District Court is the California Supreme Court decision, *Cervantes v. J.C. Penny Co.*, 24 Cal.3d 579, 592 (1979) relied upon by CAESAR for its holding that FAIRCHILD has the burden of proving its Affirmative Defenses that it is entitled to a privilege or immunity from what would ordinarily be a liability imposed by California commercial law. Both the Ninth Circuit and the District Court have placed emphasis on certain language in *Forro Precision Inc. v. IBM Corp.*, 673 F.2d 1045 (9th Cir. 1982) articulating a policy of encouraging citizens to cooperate with "reasonable police requests" for assistance. The activity found "reasonable" in *Forro* was a traditional search and seizure activity made *pursuant to a warrant issued by a magistrate* with all of the traditional restraints on law enforcement excesses implicit therein. The essential holding of *Forro* is thus a statutory construction of Sections 830.6(b), and 1530, California Penal Code, in light of the *Vallindras* decision. *Forro* holds that, based upon *specific* California statutes, it was pursuant to a "reasonable police request" as a matter of law that the private party assisted a law enforcement officer in executing a search warrant. Clearly, there is an issue of whether a Federal Special Agent would be granted immunity if he acted in his "own commercial interests" during a federal criminal investigation.

Cervantez supra at 591-592, recognizes that the issue of justification or privilege is properly a jury question:

> ". . . the question on the issue of privilege is whether the actor's conduct was fair and reasonable under the circumstances." *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13, 21 (1978).

> ". . . the defendant's justification is not an ingredient of the cause of action but rather constitutes an affirmative defense" *Lowell*, *supra* at 18.

As a general California Rule, defense of justification requires the jury to balance a series of considerations.

> "Whether [tortious conduct] is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct *and the relationship between the parties*" (underscored for emphasis); *Herron v. State Farm Mutual Ins. Co.*, 56 Cal.2d 202, 206-207 (1961); quoted in *Forro, supra* at Page 1053, Note 4.

In *Forro* the parties were competitors. In the present case the "relationship between the parties" was principal and agent with its fiduciary duty of loyalty, integrity, and avoidance of conflict of interest as a double agent which acted "in its own commercial interests." Thus *Forro* should not be glibly extrapolated to authorize absolute immunity for violation of civil law.

The District Court has found (uncontroverted by the Ninth Circuit) that FAIRCHILD itself did *not* seek to be the agent of CAESAR at the request of the Government:

> Alternatively, Caesar focuses on the fact that the federal government did not request or require that Fairchild become Caesar's agent. As Caesar correctly observes, Fairchild sought this authority from Caesar for its own

> commercial interests "to insure that any government sting operation did not deprive it of payment for the Sentry System." (Page C16, Appendix C).

The act by FAIRCHILD to seek, secure and act as an agent of CAESAR was *not* an act done in response to a "reasonable government request." It was a unilateral action by FAIRCHILD "for its own commercial interests." The District Court further held (uncontroverted by the Ninth Circuit) that in an ordinary commercial context, the actions of FAIRCHILD would constitute a breach of the fiduciary duty. The unilateral action by FAIRCHILD "for its own commercial interests" distinguishes the case at bar from any privilege or immunity granted in *Peterson, Sokol,* or *Forro.*

Neither *Willig v. Gold*, 75 Cal.App.2d 809 (1946) nor *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850 (10th Cir. 1972) authorized privilege or immunity where, as here, *no* police request (reasonable or unreasonable) was made to assume the agency. Neither of those cases address the issue of what duty to the principal is owed by the agent. In *Willig* and *Lachman*, the issue was whether a duty of confidentiality was breached by disclosures made to *third parties* by the agent. In *Willig* the disclosures occurred *after* termination of the agency relationship. *Lachman* does not even purport to construe California law. These cases are both peripheral irrelevancies.

The Ninth Circuit and the District Court also ignored the limitations placed by California law upon any privilege to cooperate with law enforcement authorities by the cases of *People v. Barraza*, 23 Cal.3d. 675, 690-691 (1979) and *People v. McIntire*, 23 Cal.3d. 742, 745 (1979). *Barraza* disapproved of police activities which

would trick a normal law abiding person into committing a crime.

> "Such [improper] conduct would include, for example, *a guarantee that the act is not illegal* or the offense will go undetected . . . [U]nder this test such matters as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant." (underscored for emphasis) *Barraza*, supra, at pages 690-691.

McIntire specifically disapproved of such police tactics when effected through the pliable assistance of private citizens, Id. at 748.

Neither the Ninth Circuit nor the District Court addressed the entrapment issue normally reserved for a jury as held in *People v. Barraza*, 23 Cal.3d. 675, 690-691 (1974) and *People v. McIntire*, 23 Cal.3d 742, 745 (1979). Petitioner respectfully submits that the Government orchestrated deception of CAESAR by the December 1983 issuance and *validation* of the SENTRY SYSTEM Export License by the Department of Commerce which *validated* the export and shipment of the SENTRY SYSTEM after having been fully informed by the United States Embassy in Paris that the Ultimate Consignee, CSF THOMSON, had not ordered and had no knowledge of the SENTRY SYSTEM, as evidenced by the deposition testimony of DOC Special Agent David Conboy, *inter alia*:

Q. Is there an ultimate consignee listed on the export license issued by the Department of Commerce No. A724404, Exhibit 419?

A. Yes, sir, there is a consignee in country of ultimate destination listed on that application, license.

Q. Who is that consignee in country of ultimate destination?

A. The consignee listed on license A724404 is Compagnie Europeenne Pour L. Industrie, Et Le Commerce International, Division C.S.F. THOMSON, 51 Rd De La Republique, 78500, Chatou, France.

Q. Did the Department of Commerce issue that export license on December 19th, 1983 after the Department of Commerce had received confirmation from the American Embassy in France that C.S.F. THOMSON did not order the Sentry 20 System?

A. Yes, sir, it did. (CONBOY TRANSCRIPT Lines 4-21, Page 79)

The *validation* of Export License A724404 by the Department of Commerce creates a jury issue of whether the investigatory privileges were exceeded under California law by the California rules prohibiting official entrapment, or entrapment by estoppel, *United States v. Clegg*, 864 F.2d 1221 (9th Cir. 1988); *United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987). At the very least, the District Court should have adjudicatd the issue of "privilege" limitation imposed thereby by California entrapment law on the Affirmative Defenses by FAIRCHILD.

The Summary Judgment by the District Court sustained by the Ninth Circuit forecloses jury verdict on whether the entrapment factor would mean that FAIRCHILD and the Government had exceeded any California immunity. CAESAR respectfully submits that the entrapment issue of fact for the jury prevents granting summary judgment in favor of FAIRCHILD on its Affirmative Defenses. To infer that the California law of privilege comprises more than the specific statutorily

defined fact situations found in *Forro*, *Peterson*, and *Sokol* is simply to substitute a broad federal common law of immunity for a limited and narrowly defined California law of immunity.

4.

THE RULES OF LAW CREATED BY THE NINTH CIRCUIT IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

CAESAR respectfully submits that the new federal common law created by the Ninth Circuit is unconstitutionally vague and overbroad. The Ninth Circuit Court has enunciated no criteria whatever for determining what is "reasonable" police request. The District Court found (uncontroverted by the Ninth Circuit) that FAIRCHILD acted "for its own commercial interests." There is no evidence whatsoever of any police request that FAIRCHILD seek, secure and/or act as the agent of CAESAR.

As is necessarily implicit in the decision of the Ninth Circuit, no evidence is required that the Federal Special Agents were acting within the internal directives and internal policy authorization of the Department of Commerce and the United States Customs Service in securing the cooperation of FAIRCHILD in perpetrating the violations of commercial law. Under the law of immunity created by the Ninth Circuit, each law enforcement agent and cooperating private citizen becomes his own self-defining source of what is authorized and what is a "reasonable" police request to a private citizen, whereby the police power of the federal government is unrestrained. Clearly, there is an issue of whether a Federal Special Agent would be

granted immunity if he acted in his "own commercial interests" during a federal criminal investigation.

Vague laws offend constitutional Due Process of Law under the Fifth Amendment to the United States Constitution.

> "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

California law itself would hold that a law which uprooted all of its commercial principles on the vaguely defined basis of a "reasonable" request for police assistance was unconstitutionally vague. What is deemed "reasonable" or "unreasonable" can differ widely from person to person and is an inadequate standard in those areas where substantial rights are being affected. *People v. Barksdale*, 8 Cal.3d. 320, 328 n.3 (1972); *United States v. Cohen Grocery Co.*, 255 U.S. 81, 92.

Vagueness may be cured only by confining the privileges claimed by FAIRCHILD to the specifically defined traditional law enforcement activity in *Peterson, Sokol, Angel* and *Forro*.

5.

THE CONCLUSION THAT FAIRCHILD WAS THE AGENT OF CAESAR TO PREPARE EXPORT DOCUMENTS TO CONFORM TO THE EXPORT LICENSE IS FALSE OR A GENUINE ISSUE OF MATERIAL FACT FOR TRIAL

The District Court concluded with regard to the documentation prepared by FAIRCHILD for the SENTRY SYSTEM:

> "Fairchild then prepared the commercial invoice, packing list, shipper's export declaration and bill of exchange in a manner consistent with Warren Thompson's instructions and Caesar's individual validated export license." (Page C7, Appendix C).

The Ninth Circuit concluded that "Fairchild prepared the necessary papers to comport with Caesar's export license, i.e., listing CSFT as the ultimate purchaser and France as the final destination" (Page A5, Appendix A).

The conclusions are false or at least create genuine issues of material fact for trial, on grounds *inter alia*:

(1) On its own initiative, FAIRCHILD prepared two sets of documentation. One set of documentation signed by a FAIRCHILD Manager, Roberta Sentz, was consistent with the individual validated export license. The second set of documentation signed by a FAIRCHILD Manager, Bruce Tarbox, was *not* consistent with the export license.

(2) The Court has accepted the conclusionary argument by FAIRCHILD with regard to alleged verbal

instructions of Warren Thompson without any citation to the transcripts of the typed telephone communications whatsoever. Indeed, the transcripts render the FAIRCHILD argument to be false. Bruce Tarbox, Manager of FAIRCHILD, told Warren Thompson how the documents should be prepared, that FAIRCHILD "re-did the documents", and not to get "panicky if you see two different sets" (EXHIBIT 13, TRANSCRIPTS FS000843 and FS000844), *inter alia*:

TARBOX: I must, I re-did the documents a couple of times . . . . (EXHIBIT 13, TRANSCRIPT, Lines 42-43, FS000853; also Lines 52-54, FS000858; Line 15, FS000843 to Line 48, FS000844).

* * * * *

Q. Let me particularly point out to you your statement:

Tarbox: So don't get panicky if you see two different sets."

Why should he get panicky?

A. I don't know. I just wanted him to know that there were two different sets. The reason being I do not, in this whole thing, when we started dealing with the letter of credit and drawing down on the letter of credit, I had a feeling that Warren Thompson had not handled too many letters of credit personally, and therefore I wanted to assure him and help him through this, especially pertaining to the letter of credit. (TARBOX TRANSCRIPT, Line 22, Page 240 to Line 10, Page 241)

CAESAR prays that the conclusions by the Ninth Circuit and the District Court that FAIRCHILD prepared the documentation for the SENTRY SYSTEM consistent with the individual validated export license

and consistent with the "instructions" of Warren Thompson vis-a-vis the direction by FAIRCHILD itself to Warren Thompson on the manner in which the documentation for the SENTRY SYSTEM should be prepared in a manner *not* consistent with the Export License are genuine issues of material fact for trial pursuant to Rule 56(e), Federal Rules of Civil Procedure.

6.

BECAUSE THE APPEAL INVOLVES AN INTERSTATE AND INTERNATIONAL FEDERAL CRIMINAL INVESTIGATION, CALIFORNIA LAW SHOULD NOT GOVERN

Federal law should govern federal police power. All of the transactions in the instant appeal were in interstate and international commerce, to wit:

(1) The Order for the SENTRY SYSTEM was from Development Engineering and Electronics Ltd. in Paris, France to CAESAR in New York.

(2) The Purchase Order for the SENTRY SYSTEM was from CAESAR in New York to FAIRCHILD in California.

(3) The acceptance by FAIRCHILD in California of the Purchase Order for the SENTRY SYSTEM, as well as the invoice and other documentation were to CAESAR in New York,

(4) The Department of Commerce and United States Customs Service conducted a prelicense check through the United States Embassy in Paris, France of the Purchaser, DEE in Paris, France, and the Ultimate Consignee, CSF THOMSON in Chatou, France, before the Export License was validated and issued by the Department of Commerce in Washington, D.C. to CAESAR in New York.

(5) In compliance with the condition by the Department of Commerce, before the issuance of the Export License, CAESAR secured a Certificate of International Importation from the Ministere des Finances et des Affaires Economiques in Paris, France, to control the importation of the SENTRY SYSTEM into France.

(6) The taped telephone communications were all to Paris, France, Las Vegas Hilton, Nevada, and Bayshore, New York.

(7) The actual SENTRY SYSTEM was seized by the United States Customs Service while in international commerce from Air France Airlines in Los Angeles, California.

(8) The facsimile SENTRY SYSTEM was sent in international commerce on Air France Airlines to Paris, France under the control of the United States Embassy Officials and the French Customs Officials in Paris, France.

(9) The search warrant and seizure by the United States Customs Service was at the offices of CAESAR in New York,

(10 Payment for the SENTRY SYSTEM was made from the Swiss Bank in Zurich, Switzerland to the Norstar Bank of CAESAR in Bayshore, New York and then by assignment to the Bank of FAIRCHILD in Chicago, Illinois.

CAESAR earnestly urges that federal law should govern federal criminal investigations; otherwise there could be as many as fifty different laws on immunity from civil liability incident to the exercise of the police power of the federal government.

7.

THE FEDERAL CRIMINAL INVESTIGATION WAS NOT LAWFUL

Small businesses throughout the United States, especially the electronics brokers-distributors, rely on the Department of Commerce not simply to issue export licenses but to *validate* the transactions on the export license. If DOC determines that the export is unlawful or unauthorized, DOC should not issue nor *validate* the export license.

In September-December 1983, the DOC conducted a prelicense check of the CAESAR export license application for the SENTRY SYSTEM through the United States Embassy in Paris, France and secured verification from CSF THOMSON that it had not ordered and had no knowledge of the SENTRY SYSTEM. Having been fully informed that CSF THOMSON had not ordered the SENTRY SYSTEM, the Department of Commerce issued with a *validation* stamp, which appears on the face of Export License A724404, to CAESAR for export of the SENTRY SYSTEM to the "Purchaser" DEE for resale to the "Ultimate Consignee" CSF THOMSON. It is respectfully submitted that the *validation* by DOC of Export License A724404 for the SENTRY SYSTEM to CAESAR was unlawful, and consequently, the federal investigation of the export pursuant to the unlawful export license was itself unlawful.

PRAYER

Petitioner prays that the United States Supreme Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: October 12, 1990

Respectfully submitted,

PACE QUINN AND ROSE
By Dean Francis Pace

Attorneys for Petitioner
CAESAR ELECTRONICS INC.

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CAESAR ELECTRONICS INC.,
Plaintiff-Appellant,

v.

PAUL R. ANDREWS, Director, United States Customs Service; FAIRCHILD SEMICONDUCTOR CORPORATION; SCHLUMBERGER TECHNOLOGIES, INC.,
Defendants-Appellees.

No. 88-15789
D.C. No. CV-87-0401-SC
OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
April 18, 1990—San Francisco, California

Filed June 7, 1990

Before: Procter Hug, Jr., Otto R. Skopil, Jr. and Mary M. Schroeder, Circuit Judges.

Opinion by Judge Skopil

SUMMARY

Immunity

Affirming a judgment of the district court, the court of appeals held that under California law, a party who cooper-

ates with the government in a criminal investigation is immune from subsequent civil liability in an action brought by the party investigated.

In 1983, appellee Fairchild Camera and Instrument Corporation manufactured the Sentry Series 20 LSI/VLSI Test System, computer hardware used for testing semiconductor chips. Because the System could have been used for military purposes, its availability for export was strictly regulated. After Fairchild received an order from appellant Caesar Electronics, Inc., supposedly acting as a broker for a French firm which in turn had allegedly received the order from another French company, Fairchild's suspicions were aroused. Fairchild contacted the Customs Service and through the cooperation of Fairchild, acting as authorized agent for Caesar, and making arrangements with the purported purchaser for delivery and payment, French customs agents were able to seize at the border a dummy system built by Fairchild when an attempt was made to divert it to Switzerland. The Department of Commerce administratively charged Caesar with two counts of violating American export laws, and Caesar filed an action against Fairchild, alleging fraud and breach of fiduciary duty and seeking some $40 million in damages as well as rescission of the contract. Caesar appealed the district court's grant of summary judgment in favor of Fairchild.

[1] The court summarized Caesar's argument by a syllogism: (1) an agent's fiduciary obligation to disclose all pertinent confidential information to its principal is the highest duty known to law; (2) Fairchild was at all relevant times acting as Caesar's agent; (3) by withholding from its principal that Caesar was the target of a criminal investigation, Fairchild violated its fiduciary obligation to its principal. The court found the argument to be meritless. [2] First, the major premise is patently false and finds no support in law. [3] Second, the minor premise is a misrepresentation of the undisputed facts. [4] Third, the conclusion is invalid because it is unsupported by the law. Under California law, citizens are

immune from civil liability for their good faith cooperation with the government in its criminal investigations. [5] The court's conclusion that Fairchild is shielded from civil liability is supported by the language set out in Civ. Code § 47(2) which states that a privileged publication is one made in any official proceeding authorized by law.

COUNSEL

Dean Francis Pace and Wm. John Kennedy, Pace and Kennedy, Los Angeles, California, for the plaintiff-appellant.

James A. Bruen, Richard C. Coffin, and Cydney T. Bachelor, Landles, Ripley & Diamond, San Francisco, California, for the defendants-appellees.

OPINION

SKOPIL, Circuit Judge:

In this case we are asked to determine whether under California law a party who cooperates with the government in a criminal investigation is immune from subsequent civil liability in an action brought by the party investigated. We conclude that the cooperating party here is immune under California law from civil liability. We affirm.

FACTS AND PRIOR PROCEEDINGS

In 1983 Fairchild Camera and Instrument Corporation ("Fairchild")[1] manufactured the Sentry Series 20 LSI/VLSI

[1]Fairchild Camera and Instrument Corporation changed its name to Fairchild Semiconductor Corporation in December 1985 and is now a division of Schlumberger Technologies, Inc.

Test System ("System"), computer hardware used for testing semiconductor chips. Because the System could have been diverted to unfriendly governments and used for military purposes, the United States Department of Commerce classified it at the highest level and placed the System on its Commodity Control List, thereby strictly regulating its availability for export.

In the fall of that year Caesar Electronics, Inc. ("Caesar") placed an order with Fairchild for the System. In doing so, Caesar purportedly was acting as broker and exporter for the French firm of Development Engineering and Electronics, Ltd. ("DEE"), which in turn had allegedly received the order from a division of another French company, C.S.F. Thomson ("CSFT").

Although the paperwork appeared to be in order, Fairchild's suspicions were aroused. Among other things, Caesar was not one of Fairchild's established customers; the order could have been routed through Fairchild's French affiliate, Enertec, S.A. ("Enertec"); and the ultimate purchaser was not interested in receiving any training or service for the System. A check revealed that CSFT had placed no such order with DEE.

Fairchild contacted the United States Customs Service ("Customs") and reported its concerns. Customs instructed Fairchild to proceed with the transaction, to cooperate with the government in its investigation of Caesar, DEE, and DEE's president, Rudolphe Agnese ("Agnese"), and to keep the investigation confidential, *i.e.*, Fairchild was not to say anything about it to Caesar. Concerned that its actions might lead to civil or criminal liability, Fairchild sought and obtained letters from the United States Departments of Justice and Commerce confirming that Fairchild was acting with the knowledge and consent of those departments and would not be subject to any liability for possible violations of Ameri-

can export laws as the result of its cooperation in the investigation.

With these assurances, Fairchild granted the investigators access to its facilities, including permission for them to monitor and record telephone conversations with Caesar's vice-president, Warren Thompson ("Thompson") and Agnese, and made false statements (at the government's request) to Thompson as part of maintaining a "cover story."

To strengthen their case against DEE and Caesar, the investigators instructed Fairchild to manufacture a dummy facsimile System (in addition to a functioning System) for eventual shipment to France. Because of concerns that it might not be compensated, Fairchild arranged for a letter of credit in the amount of $966,251 ($762,240 to Fairchild as the purchase price of the System and $204,011 to Caesar as its broker's fee) to be opened at a Swiss bank by the purported purchaser of the System. The Swiss bank was instructed to transfer the above sums to Fairchild and Caesar upon presentation of documents certifying that shipment of the System had been made. Fairchild then obtained authorization from Caesar to act as Caesar's agent in the preparation of these documents. Fairchild prepared the necessary papers to comport with Caesar's export license, *i.e.*, listing CSFT as the ultimate purchaser and France as the final destination.

On May 3, 1984 government officials in Los Angeles substituted the dummy System for a real one immediately prior to its shipment to France. Upon the dummy System's arrival in France, the Swiss bank wired the above sums to Fairchild and Caesar, respectively. On May 11, 1984 French customs agents seized the dummy System at the Swiss border when an attempt was made to divert it into Switzerland.

Thompson, Agnese, and DEE were indicted in federal district court on eight felony counts for, *inter alia*, conspiring to violate American export laws. Thompson pleaded guilty to

one count of the indictment and was sentenced to three years in prison (suspended), three years on probation, 360 hours of community service, and fined $2,500. Agnese was convicted by a French court of violating French customs laws. In addition, the Department of Commerce administratively charged Caesar with two counts of violating American export laws.

On February 2, 1987 Caesar filed the instant diversity action in federal district court against Fairchild, alleging fraud and breach of fiduciary duty and seeking some $40,000,000 in damages as well as rescission of the contract. On September 22, 1988 the district court granted Fairchild's motion for summary judgment, holding that California law immunized Fairchild from civil liability for its cooperation with the government in the investigation. Caesar subsequently filed a motion to reconsider, which was denied. A timely notice of appeal was filed twelve days later.[2]

DISCUSSION

[1] Caesar's argument may be summarized by the following syllogism: (1) an agent's fiduciary obligation to disclose all pertinent confidential information to its principal is the "highest duty known to law"; (2) Fairchild was at all relevant times acting as Caesar's agent; (3) by withholding from its principal the confidential information that Caesar was the target of a federal criminal investigation, Fairchild violated its fiduciary obligation to its principal. This argument is meritless.

[2] First, the major premise is patently false and finds no support in the law. However high the duty an agent may owe

[2]On October 27, 1988 the district court also granted the remaining defendants' notion to dismiss with prejudice. Although Caesar appealed from that r ling, the appeal was abandoned. A related appeal on Caesar's motion to intervene in the government's forfeiture action involving the System was dismissed.

its principal, society's interest in preventing the commission of criminal acts overrides that duty, as exemplified by the wealth of state and federal criminal conspiracy statutes in this country. *See also Restatement (Second) of Agency* § 411, comment b (1958) (agent's duty to principal does not extend to committing illegal acts at principal's request). *Cf., United States v. Laurins,* 857 F.2d 529, 540-41 (9th Cir. 1988) (attorney-client privilege does not extend to furtherance of crime), *cert. denied,* 109 S. Ct. 3215 (1989).

[3] Second, the minor premise is a misrepresentation of the undisputed facts. Our examination of the record shows that the only time Fairchild expressly acted as Caesar's agent was when Caesar authorized Fairchild to prepare and submit the documents necessary for the System's movement from the United States to France and the parties' receipt of payment therefor. Caesar's efforts to bootstrap this limited agency relationship into an argument that its position vis-a-vis Fairchild was from beginning to end one of principal-agent is not supported by the record.

[4] Third, the conclusion is invalid because it is unsupported by the law. Under California law, which governs in this case,[3] citizens are generally immune from civil liability for their good faith cooperation with the government in its

[3]While conceding that California law applies, Caesar makes a confusing argument about the district court's allegedly erroneous interpretation of the *Erie* doctrine with respect to the burden of proof where summary judgment is concerned, then proceeds to argue that the lower court should have applied the holding of *Angel v. Seattle-First Nat'l Bank,* 653 F.2d 1293 (9th Cir. 1981), to the facts of this case. These contentions merit little attention. First, under the *Erie* doctrine, federal law governs the procedural aspects of summary judgment in a diversity case, while the law of the forum controls the substantive issues. *See Sullivan v. Massachusetts Mut. Life Ins. Co.,* 611 F.2d 261, 263-64 (9th Cir. 1979) (per curiam). The district court did not err on this point. As for the contention that *Angel* should control here, we note that that case is both factually irrelevant and legally inapposite, involving as it does the interpretation of, *inter alia,* Washington commercial law and not California law. *See Angel,* 653 F.2d at 1297.

criminal investigations. *See, e.g., Sokol v. Public Utils. Comm'n*, 65 Cal.2d 247, 257-58, 418 P.2d 265, 272, 53 Cal. Rptr. 673, 680 (1966) (private utility not liable for damages as result of disconnecting plaintiff's telephone upon receiving information that plaintiff was using telephone for illegal purposes); *Peterson v. Robison*, 43 Cal.2d 690, 697, 277 P.2d 19, 24 (1954) (private citizen immune from civil damages for false arrest claim resulting from citizen's arrest of plaintiff at request of peace officer).

We recently applied and extended this rule of California law. *See Forro Precision, Inc. v. IBM Corp.*, 673 F.2d 1045 (9th Cir. 1982) ("*Forro I*"). In that case, IBM was sued in federal court by a competitor as the result of IBM's cooperation with Santa Clara police officers in their criminal investigation of that competitor. In reversing the district court's judgment in favor of the plaintiff, we stated:

> Our examination of the evidence adduced in this case and applicable California law leads us to conclude that the Supreme Court of California would hold that IBM's actions in assisting the police in making the search were privileged and could not serve as a basis for civil liability.

Id. at 1053. We cited with approval both *Peterson* and *Sokol*. *Id.* at 1054. Following our remand, IBM moved for summary judgment based in part on this grant of immunity. The district court agreed and granted the motion, which we affirmed on appeal. *See Forro Precision, Inc. v. IBM*, 745 F.2d 1283, 1286 (9th Cir. 1984) ("*Forro II*"), *cert. denied*, 471 U.S. 1130 (1985).

Caesar attempts to distinguish our *Forro* decisions by arguing that Fairchild's act of approaching Customs deprives it of the benefit of immunity. This is a meritless argument. The noncontroverted materials in the record reveal that Fairchild would not have gone forward with the sale but for the request

by Customs that it do so, and even then Fairchild proceeded with the transaction only upon receiving the government's written assurance that Fairchild's assistance was both legal and necessary to the investigation.[4]

[5] Our conclusion that Fairchild is shielded from civil liability is also supported by the language set out in California Civil Code § 47(2), which states, in relevant part, that "[a] privileged publication . . . is one made . . . [i]n any . . . official proceeding authorized by law." The Supreme Court of California has held that this statutory privilege applies to virtually all causes of action except malicious prosecution. *Ribas v. Clark*, 38 Cal.3d 355, 364, 696 P.2d 637, 643, 212 Cal. Rptr. 143, 149 (1985). *See also Forro I*, 673 F.2d at 1055 ("California courts have invoked the policies underlying the privilege to defeat liability for interference with business relations and related torts.").

Finally, Caesar argues that summary judgment was inappropriate because genuine issues of material fact exist with respect to whether (1) Caesar purchased, rather than merely acted as broker for, the System; (2) Fairchild acted as Caesar's agent in preparing the shipping documents; and (3) Caesar knew what use the government intended for the dummy System. Aside from the fact that these arguments are somewhat disingenuous, Caesar having conceded below that the case was ripe for summary judgment, these contentions have no bearing on the central issue of this case, *viz.*, whether Fairchild was entitled to immunity from civil liability. Fairchild properly supported its motion for summary judgment, and

[4]Furthermore, while it is not absolutely clear that Fairchild was required by law to report its suspicions to the Office of Export Administration Control, *see* 50 U.S.C. app. § 2410(b) (1982) and 15 C.F.R. § 787.14(a) & (b) (1989), the potentially large fines and quasi-criminal administrative proceedings to which it could have been subjected for not reporting such concerns indicate that the only prudent course open to Fairchild was to comply with the reporting regulations. *See e.g.*, 50 U.S.C. app. § 2410 (1982) and 15 C.F.R. § 787.1(a) & (b) (1989).

Caesar failed to proffer any directly countervailing documentation with respect to that central issue. We therefore hold that the district court did not err by entering summary judgment in favor of Fairchild. *See* Fed. R. Civ. P. 56(c), (e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 27 1990
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

CAESAR ELECTRONICS INC., Plaintiff-Appellant, v. PAUL R. ANDREWS, Director, United States Customs Service; FAIRCHILD SEMICONDUCTOR CORPORATION; SCHLUMBERGER TECHNOLOGIES, INC., Defendants-Appellees.	No. 88-15789 D.C. No. CV-87-0401-SC **ORDER**

On Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Before: Judges HUG, SKOPIL, and SCHROEDER, Circuit Judges

The motion for leave to file a petition for rehearing is granted. The petition for rehearing is denied.

APPENDIX C

FILED
SEP 22 1988
WILLIAM L. WHITTAKER, CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAESAR ELECTRONICS INC., Plaintiff, v. PAUL R. ANDREWS, DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, FAIRCHILD SEMICONDUCTOR CORPORATION, and SCHLUMBERGER TECHNOLOGIES, INC., Defendants.

NO. C 87-0401 SC
ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiff Caesar Electronics, Inc. ("Caesar"), a New York based electronics firm, brings this diversity action against Paul R. Andrews, Director of Customs, United States Customs Service ("Customs Service"), Fairchild Semiconductor Corporation and Schlumberger Technologies, Inc.[1] Caesar's claims arise out of a transaction which took place between Caesar and Fairchild in 1983 and 1984. Caesar asserts causes of action against Fairchild for fraud, breach of fiduciary duty, and rescission of contract. Caesar seeks ten million dollars in compenstory damages and thirty million dollars in

[1]Fairchild Camera and Instrument Corporation changed its name to Fairchild Semiconductor Corporation in December, 1985. Schlumberger Technologies, Inc. now owns the assets and liabilities of the Fairchild division whose transaction with Caesar forms the basis for this lawsuit. Both non-governmental defendants will be referred to collectively as "Fairchild."

punitive damages. Caesar also seeks recovery of certain computer equipment which was detained by the Customs Service.

I. BACKGROUND

The relevant factual background in this case is as follows. In the fall of 1983, Caesar placed an order with Fairchild for a Sentry Series 20 LSI/VLSI Test System (the "Sentry System") with peripheral equipment. The Sentry System is a high technology test system for semiconductor chips used for production and engineering testing at semiconductor factories. In 1983, the Sentry System was classified at the highest level of the Commodity Control List by the United States Department of Commerce ("Commerce"). Accordingly, the Sentry System is strictly regulated for export due to the possibility that such equipment could be diverted to unfriendly foreign governments and used for military purposes.

Caesar's order for the Sentry System raised suspicions at Fairchild about a possible diversion for several reasons. First, Caesar was not an established customer of Fairchild and ordered the Sentry system with an electrical configuration which could only be used outside the United States. Second, it was considered unusual that a European unser would order from the United States since Fairchild had a French affiliate, Enertec, S.A. Third, there was no indication that the purchaser was interested in training or service in connection with the Sentry System. Declaration of Theodore S. Park in Support of Motion for Summary Judgment ("Park Declaration"), ¶ 4.

In response to inquiries by Fairchild, Caesar stated that it was acting as the broker and exporter for Development Engineering and Electronics, Ltd.

("DEE"), a French firm. Caesar further stated that the ultimate purchaser was C.S.F. Thomson, a French electronics manufacturer. This information also was reflected in the individual validated export license Caesar had obtained from Commerce. A copy of this license was provided for Fairchild. Fairchild's French affiliate then made inquiries with C.S.F. Thomson and was told that C.S.F Thomson had no knowledge of an order for a Sentry System from the United States.

Theodore S. Park, then general counsel of the Test Systems Group of Fairchild, contacted officials of the Customs Service's "Operation Exodus" in September 1983 to inform them of the circumstances surrounding the Sentry System order. Operation Exodus is a program designed especially to investigate possible diversions of sophisticated technology to Eastern Bloc nations. Through this and other programs, the United States government seeks to gain the cooperation of the private sector in preventing the diversion of high technology to hostile nations. For example, through the "Operation Outreach" program, Commerce attempts to educate the business community regarding diversion schemes and enlist their assistance in identifying suspicious transactions which violate Export Administration Regulations. Commerce also occasionally solicits the cooperation of the business community in conducting undercover "sting" operations.

Customs Service Special Agent Trevor Burke requested that Fairchild go ahead with the transaction and cooperate in the government's investigation of the Sentry System order. The targets of this investigation were Caesar, DEE, and DEE's President Rudolphe Agnese. Fairchild was instructed not to inform Caesar of the investigation and to keep the investigation confidential within Fairchild. Special Agent Burke

further instructed Fairchild to keep him informed as to the progress of the order and to process the order as if there were no undercover investigation being conducted. Fairchild also agreed to provide the government with access to Fairchild facilities to conduct the investigation.

Fairchild desired reassurance that its actions would not lead to criminal or civil liability on its part for violation of export regulations. Therefore, Fairchild requested and received letters to this effect from the United States Department of Justice and the United States Department of Commerce. The first letter, from United States Attorney Joseph Russoniello, states in pertinent part:

> Fairchild has agreed to keep the United States Custom Service fully informed as to each substantive contact between Fairchild and any other party interested in the sale and shipment of the Sentry Series 20. Fairchild has also agreed to provide all cooperation necessary to monitor the actual shipment of the Sentry Series 20, if it is shipped from Fairchild.
>
> In exchange, this Office agrees to initiate no criminal prosecution against Fairchild, its subsidiaries, officers or employees in connection with the sale described in this letter.

Park Declaration, Exhibit 1.

The second letter was provided by the Commerce Department's Acting Director of the Office of Export Enforcement, Anstruther Davidson. In that letter, Mr. Davidson states:

> The Department of Commerce appreciates the cooperation you and your company have

> extended to the government in its export enforcement efforts over the past several months. . . .
>
> It is our view that by selling the Sentry 20 to Caesar, in furtherance to a government inquiry into this matter, Fairchild would not, in this instance, violate the Export Administration Act or the Regulations thereunder. This letter confirms that if Fairchild sells the Sentry 20 domestically to Caesar Electronic, Inc., it would be the responsibility of Caesar Electronics, Inc. to adhere to the provisions of the Export Administration Act of 1979 and Regulations thereunder, prior to any exportation. This also assures that all actions by Fairchild in this transaction are with the knowledge and consent of the OEE investigator working on the case.

Id. at Exhibit 2 (emphasis added).

Government investigators began monitoring the Caesar order in September 1983, and in late March 1984 were informed that the shipment would take place shortly. In April 1984, government investigators asked Mr. Park and Bruce Tarbox, credit manager to the Test Systems group of Fairchild, for permission to monitor and record telephone conversations between Fairchild employees and Caesar Vice President Warren Thompson as well as a telephone coversation with DEE President Agnese. Fairchild acceded to this request. Special Agent Burke monitored these conversations and, to facilitate the government's investigation, instructed Tarbox to ask certain questions and make a number of false statements to Thompson as part of the government's "cover story." Fairchild has admitted to making at least 62 false

statements to Caesar pursuant to Burke's directions.

Fairchild also agreed to provide the Customs Service with a non-functioning facsimile of the Sentry System and information concerning the packaging and weight of the Sentry System. The government desired this information in the event it determined that export of the Sentry System would be detrimental to the security interests of the United States. Fairchild was not informed as to what use the government would make of the facsimile.

Because the government investigators felt that they could not fully establish violation of export laws absent an attempted diversion of the Sentry System, they instructed Fairchild to go forward with shipment of the Sentry System. As shipment of the Sentry System became imminent, Fairchild wanted to ensure that it would be fully compensated for the Sentry System. Therefore, an arrangement was worked out whereby a letter of credit in the amount of $966,251 would be opened at a Swiss bank by the European purchaser of the system. Upon presentation of documents certifying that shipment had been made, the Swiss bank was to transfer the funds to the Norstar Bank in New York. Caesar then would retain $204,011 as its broker's fee and the remaining amount of $762,240 would be transfered to Fairchild as the purchase price.

The letter of credit allowed ten days from the shipping date for the presentation of documents in Switzerland certifying shipment. In order to present the documentation in timely fashion and protect its financial interest, Fairchild felt that it would be necessary to prepare the necessary shipping documents in California before sending them to Switzerland. Therefore, in late April 1984, Fairchild sought and received from Caesar

authorization to act as Caesar's agent for the preparation of these documents. Fairchild then prepared the commercial invoice, packing list, shipper's export declaration and bill of exchange in a manner consistent with Warren Thompson's instructions and Caesar's individual validated export license. That is, these documents also identified C.S.F. Thomson as the ultimate buyer although the identity of the consignee was apparently unknown. Special Agent Burke monitored these discussions between Warren Thompson and Fairchild and approved of this arrangement.

On April 30, 1984, Air Cartage Associates, a freight forwarder, delivered the Sentry System to Circle Air Transport, for transfer and export to DEE in France via Air France. On May 3, 1984, the documentation prepared by Fairchild was sent to Warren Thompson at Caesar, and then to Switzerland. On May 11, 1984, Fairchild was wire transfered $762,240 from Norstar Bank in New York.

On May 3, 1984, Special Agent Burke and other government officials substituted the facsimile for the original Sentry System at Los Angeles International Airport. The facsimile was flown to Paris, France aboard Air France Flight 004. The facsimile was later transported by truck to the Swiss border and detained by French customs agents on May 11, 1984 when an attempt was made to divert it into Switzerland. The government is still in possession of the original Sentry System.

Caesar Vice President Warren Thompson, DEE, and DEE President Rudolph Agnese were subsequently indicated for conspiracy to violate export laws, concealment of material facts after obtaining an export license, making false statements in regard to an export

license declaration, and wire fraud.[2] On November 26, 1986, Warren Thompson entered a guilty plea to count two of the indictment which charged him with concealment of material facts after obtaining an export license. Declaration of Richard C. Coffin, Exhibit 3.

On February 2, 1987, Caesar filed this lawsuit alleging causes of action against Fairchild for breach of fiduciary duty, fraud, and rescission of contract. In addition, Caesar seeks to recover the Sentry System, or its monetary value, from the Customs Service. This matter is currently before the court on plaintiff's motion for partial summary judgment, and defendant Fairchild's motions to strike certain exhibits and for summary judgment.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment motion is made an properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. R. 56(e); Celotex

[2](CR-86-20020-SW) Caesar Electronics, Inc. has not been indicted for a crime involving the export of the Sentry System. However, the statute of limitations has not expired for felony export violations and the government investigation of the Sentry System transaction is continuing.

Corp. v. Myrtle Nell Catrett, 477 U.S. ___, 91 L.Ed.2d 265 (1986). In addition, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party." Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986). If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356 (1986). No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment. California Architectural Building Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

III. ANALYSIS

Caesar's complaint makes clear that its claims against Fairchild are completely derived from Fairchild's involvement in the undercover government investigation and the actions taken by Fairchild pursuant to this investigation. Caesar alleges that:

> Fairchild made false statements and misinformation to its Principal, Caesar Electronics Inc., including without limitation, that Trevor Burke, Special Agent of the United States Customs Service, had been employed by Fairchild as a Marketing Manager. . . .
>
> In breach of the fiduciary duty of Fairchild to act as a trustee with a high degree of honesty, loyalty, integrity, and good faith, and further to make full and complete disclosure of its Principal, Caesar Electronics Inc., Fairchild

> did not . . . disclose the aforesaid Fairchild communications and transactions with the Department of Commerce and the United States Customs Service to its Principal, Caesar Electronics Inc., but Fairchild willfully engaged in false statements and misinformation during secretly recorded telephone conversations and other clandestine actions against its Principal, Caesar Electronics Inc. . . .
>
> The false statements and misinformation, failures to disclose information, and suppressions of information herein alleged to have been made by Fairchild were made with the intent to induce Plaintiff to act in the manner herein alleged in reliance thereon, to wit: shipment of the Sentry System pursuant to United States Export License A724404 issued to Caesar by the United States Department of Commerce.

First Amended Complaint, ¶¶ 14, 15, 28.

Thus, the essence of Caesar's theory is that Fairchild, as an agent of Caesar, owed Caesar a fiduciary duty to disclose the fact that it was cooperating with the government in an undercover, criminal investigation of Caesar. Caesar alleges that Fairchild's failure to do so constituted fraud and breach of fiduciary duty.

Both parties agree that this case is ripe for summary judgment. Plaintiff moves for partial summary judgment on the second and third causes of action against defendant Fairchild. Plaintiff seeks to establish defendant Fairchild's liability for breach of fiduciary duty and fraud. Plaintiff's moving papers adequately set forth the legal standards governing the behavior of private parties in a normal commercial setting. Plaintiff's motion, however, completely fails to address whether

liability can attach based on the unique circumstances of this case.

Fairchild apparently does not dispute that, in an ordinary commercial context, its actions would constitute a breach of the fiduciary duty of loyalty requiring it to keep its principal fully informed and to disclose all material facts. See, e.g., Langford v. Thomas, 200 Cl. 192 (1927); Whittaker v. Otto, 188 Cal.App.2d 619 (1961). Likewise, it seems clear that, under ordinary business circumstances, Fairchild's behavior was fraudulent. Indeed, Fairchild fully admits that it made at least 62 false statements to Caesar and concealed from Caesar the fact that it was under investigation. The question for this court, however, is whether Fairchild's actions in cooperating with an undercover criminal investigation can lead to civil liability on its part.

Fairchild argues that it is entitled to immunity under 19 U.S.C. § 507, a federal statute concerning customs seizures. During the 1983-1984 time period, section 507 read as follows:

> Every officer or other person authorized to make searches and seizures by this title, shall, at the time of executing any of the powers conferred upon him, make known, upon being questioned, his character as an officer or agent of the customs or Government, and shall have the authority to demand of any person within the distance of three miles to assist him in making any arrest, search or seizure authorized by this title, where such assistance may be necessary; and if such person shall, without reasonable excuse, neglect or refuse to assist, upon proper demand, he shall be deemed guilty of a misdemeanor, punishable by a fine of not

> more than $200 or less than $5. (emphasis added)

In 1986, section 507 was amended as part of the International Drug Traffic Enforcement Act by eliminating the reference to a three mile distance. In addition, subsection (b) was added to provide immunity to persons rendering assistance to federal officials:

> Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of the rendering of such assistance if the assisting person acts as an ordinary, reasonably prudent person would have acted under the same or similar circumstances.

19 U.S.C § 507(b).

Fairchild urges that the amended section 507 should be applied retroactively to provide it with immunity. Fairchild notes that the court "is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board, 416 U.S. 696, 711 (1974). It is not at all clear to the court, however, that section 507, even if applied retroactively, provides immunity for Fairchild's actions in connection with the undercover government investigation.

The authors of the 1986 amendment noted that:

> Customs officers must frequently rely on assistance by State and local agencies and civilians in performing their duties. For example, suspect planes picked up on radar may land before customs officers arrive. Local

> police or airport authorities are frequently called upon and asked to detain the pilot and passengers until Customs can arrive. A civilian may be called upon to assist, for example, in a body search when the person apprehended is of the same gender as the civilian. . . . Subsection (b) . . . is intended to reassure individuals who are unsure of their liability for coming to the aid of Federal officials.

H.R.Rep.No. 99-794, 99th Cong., 2d Sess. (1986).

Section 507 thus seems directed toward civilians called upon to aid Customs officers who are in the process of making an arrest or seizure and need assistance due to exigent circumstances. Indeed, section 507 authorizes Customs officers to demand assistance "in making any arrest, search or seizure." The original language of section 507, with its reference to a three mile limitation, is even more pointedly directed to these types of situations rather than citizen cooperation in a prolonged government investigation which eventually leads to an arrest or seizure. Moreover, prior to the 1986 amendment, the statute did not expressly provide for citizen immunity. While the newly amended section 507 could conceivably be construed to apply to the circumstances of this case, the court is hesitant to apply a statute retroactively when it is at best unclear whether the statute is even relevant to the facts of this case. The court feels that retroactive application of this section is not proper given the uncertainty of whether section 507 addresses the situation at issue here, and the fact that section 507 originally made no provision for civilian immunity.

Therefore, the court turns to an examination of California common law. Fairchild argues that under California law, it is entitled to immunity. California

courts have recognized that citizens assisting law enforcement officials should be entitled to immunity. In Peterson v. Robison, 43 Cal.2d 690, 697 (1954), the California Supreme Court held that a private citizen is entitled to immunity from an action for false imprisonment when he makes an arrest at a peace officer's request. The court reasoned that it would be unfair to allow the imposition of civil liability since a California statute made it a misdemeanor to refuse an officer's request to aid in an arrest. Likewise, in Sokol v. Public Utilities Commission, 65 Cal.2d 247 (1966), the California Supreme Court held that a public utility was not civilly liable for disconnecting the plaintiff's phone after being notified by the police that the phone was being used for an illegal purpose. A state Public Utilities Commission regulation required the utility to disconnect the phone under these circumstances. The court noted that it would be unfair to impose liability for doing what the law requires, and stated further that "a contrary rule would not only be inequitable but would discourage cooperation with law enforcement agencies." Id. at 258.

Most recently, the Ninth Circuit Court of Appeals has extended the California rule of civil immunity to situations where the citizen's assistance is not required by statute. Forro Precision, Inc. v. Intern. Business Machines, 673 F.2d 1045 (9th Cir. 1982) ("Forro I") and Forro Precision, Inc. v. Intern. Business Machines, 745 F.2d 1283 (9th Cir. 1984) ("Forro II"), cert. denied, 471 U.S. 1130 (1985).[3] The court stated:

We conclude that the California courts would

[3]IBM sought police assistance in locating the source of confidential documents that may have found their way into the hands of IBM competitors. The resulting investigation became a cooperative effort between the police and IBM. The lawsuit arose out of IBM's role

> extend the reasoning of Peterson and Sokol to provide immunity to IBM. An attempt to distinguish this case from Peterson and Sokol on the basis that no statute required IBM to assist the police in searching Forro's premises is unconvincing. The principal basis for the holdings in the California cases is the policy of encouraging citizens to aid the police. . . . A citizen should not have to assess his potential civil liability when presented with a reasonable police request for assistance. Otherwise, citizen cooperation might be deterred.

Forro I, 673 F.2d at 1054.

The analysis of the Ninth Circuit in Forro is equally applicable to the facts of this case. The actions of which Caesar complains were taken by Fairchild during the course of the government's investigation and with the knowledge and consent of government investigators. See infra, at p. 5 (Park Declaration, Exhibit 2). The false statements made by Fairchild were either communicated at the request of Special Agent Trevor Burke or consistent with the "cover story" designed by the

---

in a highly-publicized police search of Forro's business premises. Forro alleged that "IBM orchestrated the search of its premises in order to create a 'thunderclap' of adverse publicity, and that it thereby tortiously interfered with Forro's contractual relations." Forro II, 745 F.2d at 1284-85. Forro also alleged that IBM deliberately withheld from the police information which might have dissuaded them from searching Forro's premises. The trial court refused IBM's requested jury instruction that it was immune from civil liability and judgment was entered in favor of Forro. The Ninth Circuit reversed the judgment stating that "IBM's actions in assisting the police in making the search were privileged and could not serve as a basis for civil liability." Forro I, 673 F.2d at 1053. The trial court's granting of summary judgment for IBM on remand was affirmed by the Ninth Circuit in Forro II.

government investigators. Declaration of Trevor Burke, ¶ 11. Therefore, Caesar had made no showing as to why Fairchild's "fraudulent" actions should not be entitled to immunity under the Forro decisions. Nor has Caesar suggested that the requests made of Fairchild by government investigators were not "reasonable" in the context of undercover investigations.

Rather, Caesar persists in emphasizing that Fairchild was not required by law to assist in the government's undercover investigation; this argument founders upon the shoals of Forro I as the court's earlier analysis indicates. Alternatively, Caesar focuses on the fact that the federal government did not request or require that Fairchild become Caesar's agent. As Caesar correctly observes, Fairchild sought this authority from Caesar for its own commercial interests "to insure that any government sting operation did not deprive it of payment for the Sentry System." Plaintiff's Memorandum in Opposition, at 13.

Caesar argues that since there was no "reasonable police request" made that Fairchild become Caesar's agent, Fairchild's voluntary assumption of that role deprived it of immunity from civil liability for breaches of fiduciary duty. Thus, Caesar uses Fairchild's agency relationship as a launching pad for the proposition that Fairchild thereby assumed a fiduciary duty to cease cooperating with the government and to disclose to Caesar the fact that it was the object of an undercover government investigation.

Caesar's emphasis on Fairchild's assumption of the "highest duty known to law" is misplaced. Fairchild's decision to seek the authority to prepare certain shipping documents was based on an understandable fear that its cooperation with the government would result in

shipment of the Sentry System without any assurance of compensation. This decision and Fairchild's subsequent actions were expressly approved and monitored by the government investigators working on the case. The court is simply not persuaded that Fairchild's assumption of this authority resulted in a duty to subvert the government's investigation.

Moreover, it has never been true that a fiduciary relationship gives rise to the all-encompassing loyalty requirements envisioned by plaintiff. For example, in Willig v. Gold, 75 Cal.App.2d 809 (1946), an agent revealed to a third party insurance company that his principal had misrepresented the amount of insurance premiums due the insurance company. The insurance company paid the agent a commission on the amount it recovered from the principal. The principal brought suit to recover the money he was forced to pay the insurance company on the theory that the payment was "the fruits of a breach of the confidential relation existing between agent and principal." Id. at 810. The Court of Appeals affirmed the trial court's dismissal of the principal's claim:

> [The principal's] claim is somewhat startling. . . . He cites no case, and we are sure that none can be found, that an agent is under a legal duty not to disclose his principal's dishonest acts to the party prejudicially affected by them.

Id. at 814.

Similarly, in Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850 (10th Cir. 1972), an agent hired to survey a an oil well discovered that the well invaded the land of neighboring third parties. The contract forbade the agent from revealing information concerning

the survey to any third party. Nevertheless, the agent notified the third parties who successfully sued the principal. The principal then sued the agent for breach of contract. The Tenth Circuit affirmed the dismissal of the principal's action stating that "Oklahoma has expressed a stronger interest in the punishment of wrongful behavior than in the strict enforcement of contracts when the two interests collide." Id. at 853.

Plaintiff's notion that a fiduciary duty "trumps" the compelling interest in enforcing this nation's export laws and regulations is fantastical to say the least. Therefore, the court finds no merit in Caesar's assertion that Fairchild violated a fiduciary duty through the failure to warn its principal that it was the target of a government investigation. Caesar can direct the court to no opinion which stands for this bizarre notion. Indeed, such an outcome would require civilians to frustrate law enforcement efforts and would be completely contrary to public policy.

Further, to the extent that Caesar's claims are based upon Fairchild's failure to reveal communications between itself and the government, these claims are barred by California Civil Code § 47(2) which provides:

> A privileged publication or broadcast is one made—. . . .
> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law. . . .

The statutory privilege of section 47(2), while appearing in the code chapter on defamation, has been held to apply to "virtually all other causes of action, with the exception of malicious prosecution." Ribas v. Clark, 38 Cal.3d 355, 364 (1985).

In Forro I, the Ninth Circuit held that IBM's communications with the authorities, even if motivated by malice or ulterior motive, were privileged under section 47(2) and could not form the basis for any claims against IBM. The court's holding was based on its reasoning that:

> Underlying the privilege is the policy of encouraging freedom of communication between citizens and public authorities charged with investigating wrongdoing. Accordingly, the privilege applies to communications designed to prompt officials to initiate proceedings as well as to communications made during the course of proceedings.

Forro I, 673 F.2d at 1055. Therefore, to the extent that Caesar's claims are based on the fact that Fairchild "deliberately suppressed and concealed communications and transactions" with the government, these claims are barred by section 47(2) as well.

The court finds that Fairchild's actions in responding to a reasonable request for assistance in an undercover criminal investigation may not serve as the basis for civil liability. Therefore, the court dismisses plaintiff's claims for breach of fiduciary duty, fraud, and rescission of contract based on misrepresentation since these claims are all premised on Fairchild's role in the government's investigation. In addition, the court notes that it finds no support for Caesar's rescission claim notwithstanding Fairchild's immunity. Caesar offers to restore the Sentry System to Fairchild when it recovers the System from the government if Fairchild returns the purchase price. First Amended Complaint, ¶ 37. However, Caesar is not entitled to recovery of the purchase price due to the simple fact that Caesar got the benefit of its bargain—

the $204,011 commission. There is no evidence whatsoever that suggests Caesar purchased the Sentry System itself. Caesar's attempt to recover the Sentry System from the government through intervention in a civil forfeiture action was rejected for this very reason. United States v. One Sentry 20 LSI/VLSI Integrated Circuit Test System, No. C-86-20264-SW (N.D. Cal. June 15, 1987) (order dismissing intervenor's claim). Caesar acted as a export broker, received its broker's fee of $204,011, and has no right to recovery of the purchase price. Finally, defendant Fairchild moves to strike certain of plaintiff Caesar's exhibits. This motion is denied.

In accordance with the foregoing, the court hereby orders that:

(1) plaintiff's motion for partial summary judgment is denied;

(2) defendant Fairchild's motion for summary judgment is granted; and

(3) defendant Fairchild's motion to strike is denied.

Dated: September 22, 1988

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
DEC -2 1988
WILLIAM L. WHITTAKER, CLERK

CAESAR ELECTRONICS INC., Plaintiff, v. PAUL R. ANDREWS, DIRECTOR OF CUSTOMS, UNITED STATES CUSTOMS SERVICE, FAIRCHILD SEMICONDUCTOR CORPORATION, and SCHLUMBERGER TECHNOLOGIES, INC., Defendants.	No. C 87-0401 SC ORDER DENYING PLAINTIFF'S MOTION TO VACATE JUDGMENT

Plaintiff Caesar Electronics, Inc. ("Caesar"), a New York based electronics firm, brings this action against Paul R. Andrews, Director of Customs, United States Customs Service ("Customs Service"), Fairchild Semiconductor Corporation, and Schlumberger Technologies, Inc. (collectively "Fairchild"). This case arises out of an undercover government investigation which resulted in the seizure of a highly sophisticated semiconductor chip test system, the Sentry Series 20 ("the Sentry System") Caesar was acting as the intermediary between the overseas purchaser, and Fairchild, the manufacturer of the Sentry System. The United States seized the Sentry System in May 1984 before it was shipped to Europe because of a possible violation of federal export regulations. Caesar asserts causes of action against Fairchild for fraud, breach of fiduciary duty, and rescission of contract. Caesar seeks

ten million dollars in compensatory damages and thirty million dollars in punitive damages. Caesar also seeks recovery of the Sentry System or its monetary value from the Customs Service.

Caesar's claims against Fairchild are derived from Fairchild's involvement in the undercover government investigation and the actions taken by Fairchild pursuant to the investigation. Both parties agree that Fairchild made a number of misrepresentations to Caesar and concealed facts from Caesar as part of its role in the government's investigation. Caesar's claims against Fairchild are based on the premise that Fairchild, as an agent of Caesar, owed Caesar a fiduciary duty to disclose the fact that it was cooperating in an undercover investigation of Caesar. Caesar alleges that the false statements and failure to disclose on Fairchild's part constituted fraud and breach of fiduciary duty.

On September 22, 1988, this court issued a fairly lengthy order granting summary judgment for defendants Fairchild and Schlumberger on all claims against them by Caesar. The court held that Fairchild's actions in responding to a reasonable government request for assistance in an undercover criminal investigation could not serve as the basis for civil liability. The court's decision was based on public policy considerations as well as the holding of the U.S. Court of Appeals for the Ninth Circuit in Forro Precision, Inc. v. Intern. Business Machines, 673 F.2d 1045 (9th Cir. 1982) and Forro Precision, Inc. v. Intern. Business Machines, 745 F.2d 1283 (9th Cir. 1984), cert. denied, 471 U.S. 1130 (1985).

On October, 18, 1988, plaintiff's remaining claims against the Customs Service seeking recovery of the Sentry System were dismissed by this court. The court

held that Caesar's sole remedy is to seek recovery of the Sentry System in the civil forfeiture action.

This matter is currently before the court on Caesar's motion to vacate, alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). Plaintiff argues that the court ignored relevant case law, created an "unconstitutionally vague and overbroad" rule of law, and reached conclusions which are false or create genuine issues of fact for trial.

Plaintiff's memorandum consists in large part of a reiteration or reformulation of arguments which were previously made and rejected by this court in connection with the parties' prior cross-motions for summary judgment. The court's legal analysis and discussion of what it considers to be the relevant case law is amply set out in its previous orders. If plaintiff is dissatisfied with the court's holding, plaintiff may seek review in the court of appeals.

Plaintiff also argues that the court somehow created "an unconstitutionally vague and overbroad law." This argument is spurious. The court simply held that, based on the facts of this case, the defendants could not be held civilly liable for their cooperation in the government's criminal investigation.

Plaintiff also now suggests that the court based its opinion on erroneous factual conclusions or failed to recognize numerous genuine issues of fact for trial. Plaintiff's argument is somewhat disingenuous given the fact that both parties previously agreed that this case was ripe for summary judgment. The supposedly disputed factual issues now cited by plaintiff simply do not create material issues for trial. In sum, plaintiff's motion is without merit and is denied.

IT IS SO ORDERED

Dated: ~~November~~ December 1, 1988

United States District Judge

APPENDIX E

SECTION 47 CALIFORNIA CIVIL CODE

Section 47. Privileged publication or broadcast

A privileged publication or broadcast is one made—

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof,

or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

5. By a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

APPENDIX F

SECTION 830.6(b) CALIFORNIA PENAL CODE

Section 830.6. Reserve or auxiliary officers; deputies; posse comitatus

(a)(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman, a deputy sheriff, a reserve police officer of a regional park district, or a deputy of the Department of Fish and Game, and is assigned specific police functions by such authority, such person is a peace officer; provided, such person qualifies as set forth in Section 832.6, and provided further, that the authority of such person as a peace officer shall extend only for the duration of such specific assignment.

(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city policeman, a deputy sheriff, or a reserve police officer of a regional park district, and is so designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by such authority, such person is a peace officer; provided such person qualifies as set forth in paragraph (1) of subdivision (a) of Section 832.6, and provided further, that the authority of such person shall include the full posers and duties of a peace officer as provided by Section 830.1.

(b) Whenever any person is summoned to the aid of any uniformed peace officer, such person shall be vested with such powers of a peace officer as are expressly delegated him by the summoning officer or as are otherwise reasonable necessary to properly assist such officer.

In 1986 and 1989, Section 830.6 California Penal Code was amended as follows:

Section 830.6. Reserve or auxiliary officer; deputy: regional park district; transit district; fish and game department; justice department special agent; person summoned to aid uniformed officer

(a)(1) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city * * * *police officer*, a deputy sheriff, a reserve police officer of a regional park district or of a transit district, or a deputy of the Department of Fish and Game, *or a special agent of the Department of Justice*, and is assigned specific police functions by that authority, the person is a peace officer; provided, the person qualifies as set forth in Section 832.6, and provided further, that the authority of the person as a peace officer shall extend only for the duration of the person's specific assignment. A transit district reserve officer may carry firearms only if authorized by, and under those terms and conditions as are specified by, his or her employing agency.

(2) Whenever any qualified person is deputized or appointed by the proper authority as a reserve or auxiliary sheriff or city * * * *police officer*, a deputy sheriff, or a reserve police officer of a regional park district or of a transit district, and is so designated by local ordinance or, by resolution, either individually or by class, and is assigned to the prevention and detection of crime and the general enforcement of the laws of this state by that authority, the person is a peace officer; provided the person qualifies as set forth in paragraph (1) of subdivision (a) of Section 832.6, and provided further, that the authority of the person shall include

the full posers and duties of a peace officer as provided by Section 830.1, or in the case of a transit district reserve police officer, the posers and duties which are authorized in Section *830.33*.

(b) Whenever any person is summoned to the aid of any uniformed peace officer, the summoned person shall be vested with the posers of a peace officer as are expressly delegated to him or her by th summoning officer or as are otherwise reasonably necessary to properly assist the officer.

APPENDIX G

SECTION 1530 CALIFORNIA PENAL CODE

Section 1530. Service by officers; persons aiding officer

BY WHOM SERVED. A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

APPENDIX H

19 U.S.C. § 507

During 1983-1984, 19 U.S.C. § 507 was as follows:

Section 507. Officers to make character known

> Every officer or other person authorized to make searches and seizures by this title, shall, at the time of executing any of the posers conferred upon him, make known, upon being questioned, his character as an officer or agent of the customs or Government, and shall have the authority to demand of any person within the distance of three miles to assist him in making any arrest, search or seizure authorized by this title, where such assistance may be necessary; and if such person shall, without reasonable excuse, neglect or refuse to assist, upon proper demand, he shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $200 or less than $5.

In 1986, 19 U.S.C. § 507 was amended as part of the International Drug Traffic Enforcement Act, as follows:

Section 507. Officer to make character known; assistance for officers

(a) Every customs officer shall—

> (1) upon being questioned at the time of executing any of the powers conferred upon him, make known his character as an officer of the Federal Government; and
>
> (2) have the authority to demand the assistance of any person in making any arrest, search, or seizure authorized by any law enforced or administered by customs officers, if such assistance may be necessary.

If a person, without reasonable excuse, neglects or refuses to assist a customs officer upon proper demand under paragraph (2), such person is guilty of a misdemeanor and subject to a fine of not more than $1,000.

(b) Any person other than an officer or employee of the United States who renders assistance in good faith upon the request of a customs officer shall not be held liable for any civil damages as a result of the rendering of such assistance if the assisting person acts as an ordinary, reasonable prudent person would have acted under the same or similar circumstances.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 16, 1990, I served the within *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

James A. Bruen, Esquire
Landels, Ripley & Diamond
Hills Plaza
350 Steuart Street
San Francisco, California 94105-1250

Hon. William C. McGiven
United States Attorney
Department of Justice
450 Golden Gate Avenue
San Francisco, California 94133

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 16, 1990, at Los Angeles, California.

Betty J. Malloy
(Original signed)